UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DERMOT HARVEY, et al., o/b/o JULIAN L. HARVEY,	***)***	
Plaintiffs	***)***	
v.	***)***	***Docket No. 98-85-P-DMC***
MID-COAST HOSPITAL,	***)***	
Defendant	***)***	

MEMORANDUM DECISION ON DEFENDANT'S BILL OF COSTS

The defendant, in whose favor the jury found following trial on the liability portion of this medical malpractice action, Docket No. 79, has submitted a bill of costs which it asks this court to tax against the plaintiffs in the amount of $21,148.25, Docket No. 86. The plaintiffs have objected to the bill of costs on several grounds. Docket No. 89.

The post-trial award of costs is governed by Fed. R. Civ. P. 54(d), which provides, in relevant part:

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . . .

Fed. R. Civ. P. 54(d)(1). There is no applicable statutory provision in this case, nor does any other procedural rule apply. Rule 54(d) provides the courts with a negative discretion, the power to decline to tax as costs items enumerated in 28 U.S.C. § 1920. *In re San Juan Dupont Plaza Hotel*

Fire Litig., 994 F.2d 956, 962 (1st Cir. 1993). The rule creates a presumption in favor of awarding costs to a prevailing litigant. *Id*. at 962-63.

The presumption may be overcome, however. A federal district court "must award costs unless equity demands otherwise due to some impropriety on the part of the prevailing party during the course of the litigation." *National Info. Servs., Inc. v. TRW, Inc.*, 51 F.3d 1470, 1473 (9th Cir. 1995). Other courts that have addressed this issue agree that an award of costs may be denied to the prevailing party when that party has engaged in misconduct during the litigation. *E.g., Reed v. International Union of United Auto., Aerospace & Agric. Implement Workers of Am.*, 945 F.2d 198, 204 (7th Cir. 1991); *Gilchrist v. Bolger*, 733 F.2d 1551, 1557 (11th Cir. 1984). The defendant here contends that the court may deny costs on this basis only when the prevailing party has called unnecessary witnesses, raised unnecessary issues, encumbered the record, or delayed in raising an objection fatal to the opponent's case, apparently because these are the specific situations in which courts have denied costs.[1] Defendant Mid-Coast Hospital, Inc.'s Reply to Plaintiff's Objection to Bill of Costs (Docket No. 90) at 3. I do not believe that the court's discretionary power is so limited.

In this case, I have already expressed my dismay at the reference by the defendant's counsel during closing argument to his client as "a community not for profit hospital," after my ruling on a motion *in limine* filed by the plaintiffs excluded evidence or argument regarding the potential financial impact on the hospital defendant of a verdict for the plaintiffs. Ruling on Plaintiffs' Motion for New Trial (Docket No. 85) at 1-2. I will not repeat my discussion of that event here, but, for the

[1] *But see Litton Sys., Inc. v. AT&T*, 91 F.R.D. 574, 575, 578 (S.D.N.Y. 1981) (depriving prevailing party of attorney fees and costs due to counsel's "gross negligence and intentional misrepresentation in responding to discovery requests and court orders for production of documents").

reasons I have stated earlier, both on the record at trial and in my ruling on the motion for new trial, I have no difficulty in reaching the conclusion that this reference during closing argument constituted at the very least an impropriety more serious than the specific justifications for denial of costs listed by the defendant. Denial of costs is an appropriate penalty for this breach and, hopefully, a deterrent against such conduct in the future.

Accordingly, the defendant's bill of costs is **DENIED** in its entirety.

Dated this 30th day of April, 1999.

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David M. Cohen
United States Magistrate Judge